

file



**Before The  
State Of Wisconsin  
DIVISION OF HEARINGS AND APPEALS**

---

In the Matter of the Application of James Grafft  
for a Permit to Construct a Permanent Boat Shelter  
on Stone Lake, Town of Manitowish Waters, Vilas  
County, Wisconsin

---

Case No.. 3-NO-98-64016

---

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

James Grafft applied to the Department of Natural Resources for a permit pursuant to sec. 30.12, Stats., to construct a permanent boat shelter on the bed of Stone Lake in Vilas County, Wisconsin. On July 6, 1998, the Department of Natural Resources issued an order finding that the proposed project would be detrimental to the public interest in Stone Lake and denying the application. On August 5, 1998, the Department received a request for hearing pursuant to sec. 227.42, Stats., from Attorney Neal A. Nielsen III, on behalf of Mr. Grafft. On September 24, 1998, the Department granted the request for a contested case hearing.

On September 29, 1998, the Department of Natural Resources filed a Request for Hearing with the Division of Hearings and Appeals. Pursuant to due notice a hearing was conducted on December 4, 1998, in Eagle River, Wisconsin. Mark J. Kaiser, Administrative Law Judge, presided.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

James Grafft, applicant, by

Attorney Neal A. Nielsen III  
201 North Railroad Street  
P. O. Box 1715  
Eagle River, WI 54521

Wisconsin Department of Natural Resources, by

Attorney Michael Scott  
101 S. Webster Street  
Madison, WI 53707

## FINDINGS OF FACT

1. James Grafft owns real property abutting Stone Lake in Vilas County. The legal description of the property is the SW ¼ of the NE ¼ of Section 14, Township 42 North, Range 5 East, Town of Manitowish Waters, Vilas County, Wisconsin.

2. James Grafft (applicant) applied to the Department of Natural Resources (Department) for a permit to construct a permanent boat shelter on the bed of Stone Lake adjacent to his property. Stone Lake is part of the Manitowish Chain of Lakes which is in excess of 1000 acres in size. Stone Lake is navigable-in-fact at the site for the proposed boat shelter. The applicant and the Department have fulfilled all procedural requirements of secs. 30.12 and 30.02, Stats

3. By order dated July 6, 1998, the Department denied the application. The basis for the denial as stated in the order are:

a. The project will not conform to the standards in sec NR 326 055, Wis. Adm. Code, because there are not five visually intrusive principal structures within 500 feet of the proposed site.

b. The project will result in adverse impacts to fish and game habitat in the navigable waters involved.

c. The proposed project will adversely affect water quality and will increase water pollution in Stone Lake and will cause environmental pollution as defined in subsec. 144.01(3), Stats.

At the hearing, the Department withdrew the grounds "b" and "c" for denial and stipulated that the sole basis for its denial of the application is that there are not five visually intrusive principal structures within 500 feet of the site of the proposed permanent boat shelter

4. There are five homes, including that of the applicant, plus garages, boat houses and rental cabins within 500 feet of the site of the proposed permanent boat shelter. The dispute in this case revolves around which of these buildings is a principal structure, a legal issue, and of the principal structures, which are "visually intrusive," a factual issue.

5. In its Water Regulation Handbook, the Department has defined "principal structure" as "a building in which the primary use of the lot on which the building is located is conducted." The Water Regulation Handbook is not a promulgated rule and does not have the force and effect of law. However, this is a reasonable definition of the phrase "principal structure" and will be adopted for purposes of this decision. Using this definition the five homes are the only principal structures for purposes of sec. 326 055(4)(f), Wis. Adm. Code.

The phrase "visually intrusive" is defined at sec. NR 326.03(11), Wis. Adm. Code. Section NR 326.03(11), Wis. Adm. Code provides.

"Visually intrusive" means clearly standing out from the shoreline background because of color or reflectivity when viewed from out on the water during the time when leaves are on deciduous trees.

6. The Grafft property is the middle lot of a group of five developed lots along the south shore of Stone Lake. Starting from the east, the first lot is owned by the Rause family. On the Rause lot is a large log home with multiple, reflective windows facing the lake (exhs. 11, 23 and 24). The Rause home is visually intrusive because of its size and the reflectivity of the windows. The next lot is owned by the Ramuta family. On the Ramuta lot is a dark red, one story home. The Ramuta home is well screened by vegetation and is nearly invisible from the water except for the light colored roof (exhs. 7, 10 and 20). The Ramuta home is not visually intrusive. The next lot is the applicant's lot. The applicant's home has a natural wood appearing siding (exhs. 9 and 20). The applicant's home is visible from the water and for purposes of sec. NR 326.055(4)(f), Wis. Adm. Code, is visually intrusive.

The next lot is owned by the Haen family. On the Haen lot is a house which appears to be dark brown in color with several large picture windows facing the lake (exhs. 12 and 20). The Haen home is visually intrusive due to the reflectivity of the windows. The last lot is owned by the Tollefsons. The Tollefson lot contains several rental cabins and the Tollefsons personal residence. For purposes of this decision the parties stipulated that the rental cabins are not principal structures. The Tollefson home appears to be dark brown in color. The Tollefson home is visible from the water and for purposes of sec. NR 326.055(4)(f), Wis. Adm. Code, is visually intrusive.

7. The five homes described above are within 500 feet of the site of the proposed site for the boat shelter. These five homes are the only principal structures located within 500 feet of the site for the proposed boat shelter. Because the Ramuta home is found not to be visually intrusive, there are not five principal structures that are visually intrusive within 500 feet of the site. The proposed site is not; therefore, a developed shoreline for purposes of sec. NR 326.055(4)(f), Wis. Adm. Code. Accordingly, a permit for a permanent boat shelter can not be granted for this site.

8. The proposed permanent boat shelter does not constitute a major action for purposes of sec. 1.11(2)(c), Stats. The Department of Natural Resources has complied with the procedural requirements of sec. 1.11, Stats., and Ch. NR 150, Wis. Adm. Code, regarding assessment of environmental impact.

#### Discussion

Pursuant to sec. NR 326.055(4)(f), Wis. Adm. Code, a permit for a permanent boat shelter can only be issued for a site along a developed shoreline. Developed shoreline is defined as an area containing at least five principle structures within 500 feet of the proposed boat shelter.

site which are "visually intrusive." The only issue in this case is whether the five homes described in the Findings of Fact are visually intrusive. In a letter to the applicant dated June 26, 1998, LuAnn Smit, a Department employee reviewing Mr. Grafft's application, advised him that she determined that two of the homes, the Rause home and the Tellefson home, are visually intrusive, two of the homes, the Grafft home and the Haen home, are "somewhat" visually intrusive, and the fifth home, the Ramuta home, is not visually intrusive. Assuming that "somewhat visually intrusive" means visually intrusive, this case ultimately comes down to the question of whether the Ramuta home is visually intrusive.

Admittedly, this determination is subjective; however, based on the photographic exhibits in the record, the Ramuta home is not visually intrusive when viewed from the water. Additionally, although the other four homes were found to be either visually intrusive or somewhat visually intrusive, I would note that all five property owners have attempted to minimize the visual impact of their homes when viewed from the lake by using natural colors for the siding of their homes and maintaining a relatively large amount of vegetative cover to screen their homes from view. Arguably, none of these homes are "visually intrusive" according to the definition of that phrase at sec. NR 326.03(11), Wis. Adm. Code.

The applicant also argued that sec. NR 326.055(4)(f), Wis. Adm. Code, is inconsistent with sec. 30.12(3)(c), Stats. Sec. 30.12(3)(c), Stats., provides:

The department may promulgate rules deemed necessary to carry out the purposes of [granting permits for permanent boat shelters] including rules to establish minimum standards to govern the architectural features of boat shelters and the number of boat shelters that may be constructed adjacent to a parcel of land. The rules may not govern the aesthetic features or color of boat shelters. The standards shall be designed to assure the structural soundness and durability of a boat shelter. A municipality may enact ordinances not inconsistent with this section or with rules promulgated under this section regulating the architectural features of boat shelters.

The legislature has prohibited the Department from promulgating rules that govern the aesthetic features or color of boat shelters. Section NR 326.055(4)(f), Wis. Adm. Code, does not attempt to govern aesthetic features of boathouses, but rather regulates where boat shelters may be placed. On its face, the administrative rule is not inconsistent with the statute. Section NR 326.055(4)(f), Wis. Admin. Code, prohibits the issuance of permits for boat shelters at locations where there are not five principle structures which are visually intrusive within 500 feet of the proposed site. At best, the site for this proposed boat shelter has only four principal structures which are visually intrusive within 500 feet of it. Accordingly, no permit for a permanent boat shelter can be issued at this site and the Department's order must be affirmed.

In conclusion, it should be noted that the fact that the applicant in this case was arguing that these homes are visually intrusive while the Department was attempting to show that the homes were not visually intrusive underscores the irony of sec. NR 326.055(4)(f), Wis. Adm. Code. The Department, in most cases, is attempting to encourage riparian owners to minimize the visual impact of their homes when viewed from the lake. However, a person applying for a boat shelter permit is penalized for doing so. If the Ramutas' repainted their home a bright color, Mr. Grafft may then be eligible for a permit for a permanent boat shelter. I understand that the

Department is attempting to restrict construction of new boat shelters to already developed shorelines, however, by attempting to do so, they provide an incentive to riparian owners to make their homes "visually intrusive."

#### Conclusions of Law

1. James Grafft is an owner of land riparian to Stone Lake. Stone Lake is a navigable body of water.

2. There are not five principal structures which are visually intrusive within 500 feet of the proposed boat shelter site. The proposed site is not; therefore, a developed shoreline for purposes of sec NR 326.055(4)(f), Wis. Adm Code. Accordingly, a permit for a boat shelter can not be granted for this site.

3. The Division of Hearings and Appeals has authority pursuant to secs. 30.02, 30.12, and 227.43(1)(b), Stats, to issue the following order

#### Order

The order of the Department of Natural Resources denying the application of James Grafft for a permit to construct a boat shelter on the bed of Stone Lake is affirmed.

Dated at Madison, Wisconsin on January 7, 1999.

STATE OF WISCONSIN  
DIVISION OF HEARINGS AND APPEALS  
5005 University Avenue, Suite 201  
Madison, Wisconsin 53705  
Telephone: (608) 266-7709  
FAX: (608) 267-2744

By: Mark Kaiser  
MARK J KAISER  
ADMINISTRATIVE LAW JUDGE

## NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs 227.52 and 227.53, Stats.

3 Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats, to insure strict compliance with all its requirements.